168

(5)

No. 09-1142

IN THE

Supreme Court of the United States

FIA CARD SERVICES, N.A., PETITIONER,

v.

JOHN C. GORMAN, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a furnisher's failure to report consumer debt as "disputed" upon completion of a required investigation under § 1681s-2(b)(1)(A) of the Fair Credit Reporting Act ("FCRA") can render the information incomplete or inaccurate in violation of Section 1681s-2(b).

2. Whether the rights and remedies created by Cal. Civ. Code § 1785.25(a) are preempted by the FCRA?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES ..... iii-iv

INTRODUCTION 1

STATEMENT 2

1. The Facts 3

2. Statutory Background 4

REASONS FOR DENYING THE WRIT 8

I. NEITHER QUESTION PRESENTED IMPLICATES A CIRCUIT SPLIT 8

II. THE FIRST QUESTION PRESENTED IS A NARROW QUESTION OF STATUTORY INTERPRETATION THAT DOES NOT MERIT REVIEW BY CERTIORARI 10

III. THE SECOND QUESTION PRESENTED PERTAINING TO PREEMPTION WAS NEITHER PROPERLY RAISED NOR DECIDED BELOW 15

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES:

Alexander v. Moore & Associates, Inc.,
553 F.Supp. 948 (D. Haw. 1982) 14

Crabill v. Trans Union, L.L.C.,
259 F.3d 662 (7th Cir. 2001) 14

Dalton v. Capital Associated Industries, Inc.,
257 F.3d 409 (4th Cir. 2001) 13

Delta Airlines v. August, 450 U.S. 346 (1981) 2

Equifax Services, Inc. v. Cohen.,
420 A.2d 189 (Me. 1980) 10

Liceaga v. Debt Recovery Solutions, LLC.,
2009 Cal. LEXIS 4272 (2009) 9

Lin v. Universal Card Services Corp.,
238 F.Supp.2d 1147 (N.D. Cal. 2002) 9

Sanai v. Saltz,
170 Cal.App.4th 746 (2009) 9

Saunders v. Branch Banking & Trust Co. of Va.,
526 F.3d 142 (4th Cir. 2008) 4, 12–13

Sepulvado v. CSC Credit Services, Inc.,
158 F.3d 890 (5th Cir. 1998) 4

Youakim v. Miller, 425 U.S. 231 (1976) 16

STATUTES & REGULATIONS:

California Consumer Credit Reporting Agencies Act,
Cal. Civ. Code § 1785 1
Cal. Civ. Code § 1785.1(c) 7
Cal. Civ. Code § 1785.25 ..... 1, 3-4, 7
Cal. Civ. Code § 1785.25(a) 3-4, 7-8, 15
Cal. Civ. Code § 1785.25(g) 7-9
Cal. Civ. Code § 1785.31 ..... 8, 10

Fair Credit Reporting Act,
15 U.S.C. § 1681(a)(1) 4
15 U.S.C. § 1681i(a)(2) 6
15 U.S.C. § 1681n 3
15 U.S.C. § 1681o 3
15 U.S.C. § 1681s-2 ..... 5, 7-8
15 U.S.C. § 1681s-2(a) 13
15 U.S.C. § 1681s-2(a)(1)(A) 5
15 U.S.C. § 1681s-2(a)(3) 5, 11-12
15 U.S.C. § 1681s-2(b) 3, 5, 10, 12-13
15 U.S.C. § 1681s-2(b)(1) 6
15 U.S.C. § 1681t 8
15 U.S.C. § 1681u(a) 6-7
15 U.S.C. § 1681u(b)(1)(F) 7
15 U.S.C. § 1681u(b)(1)(F)(ii) 7-8

Truth in Lending Act, 12 C.F.R. § 226.13 11

OTHER AUTHORITIES:

Eugene Gressman, et al., *Supreme Court Practice* 464 -65 (9th ed. 2007) 16

INTRODUCTION

Petitioner FIA Card Services, N.A. (formerly known as "MBNA" and referred to in this litigation as "MBNA") urges this Court to review two questions: (1) whether, when the validity of a debt is disputed by a consumer, the failure of the furnisher of the credit information to report the debt as "disputed" renders the information incomplete or inaccurate under the FCRA; and (2) whether the remedies provisions of Cal. Civ. Code § 1785.25 are preempted by the FCRA. Neither question is remotely certworthy. Indeed, the petition does not allege the existence of a circuit split as to either question. And the second question is deficient in that the issue of conflict preemption was not even properly raised or decided below, and therefore is not preserved for review by this Court.

The first question, regarding the obligation of a credit furnisher to report information as "disputed," is a narrow question of statutory interpretation unworthy of this Court's review. The petition is at best a plea for error correction, but the appellate court's ruling on that question does not break new ground and is correct on the merits. At the very least, this Court should await a circuit split or some evidence that petitioner's hyperbolic predictions of dire harm to the U.S. banking system are more than imaginary.

The second question presented concerns whether the remedies provisions of Cal. Civ. Code § 1785 are preempted by the FRCA. Yet MBNA's conflict preemption argument was not timely advanced

below. MBNA raised this argument for the first time in its unsuccessful petition for rehearing *en banc*. As such, the issue was never briefed or argued on the merits. Indeed, the court of appeals expressly noted that "MBNA did not advance this contention before us initially, so the argument is waived." Pet. App. 57, n.35. Because "that question was not raised in the Court of Appeals," it is "not properly before [this Court]." *Delta Airlines v. August*, 450 U.S. 346, 362 (1981).

STATEMENT

This is basically a glorified small claims case. It involves a dispute over several hundred dollars in credit card charges that were posted by MBNA to Gorman's VISA account in 2002 for the purchase of what turned out to be used and defective satellite television equipment and installation services. Gorman timely disputed the charges. The merchant eventually acknowledged that the goods were defective and that Gorman's dispute was meritorious, yet MBNA refused to remove the charges. It began reporting Ge[illegible]s account to the three major CRAs as "delinquent."

Gorman contacted Experian, TransUnion, and Equifax to dispute the accuracy of the reported charges. The CRAs notified MBNA of Gorman's dispute, thereby triggering a duty under the FCRA to conduct a reasonable investigation and correct any inaccuracies. MBNA confirmed that the information it had previously transmitted was accurate without notifying the CRAs that Gorman had been consistently disputing the validity of the charges.

1. The Facts. Gorman's complaint alleges causes of action for libel, violation of Cal. Civ. Code § 1785.25(a), intentional failure to correct inaccurate credit information in violation of 15 U.S.C. § 1681n of the FCRA, and negligent failure to correct inaccurate credit reporting in violation of 15 U.S.C. § 1681o.

MBNA was granted summary judgment as to all claims. The district court concluded that Gorman had failed to raise a genuine issue of material fact as to whether MBNA had violated the FCRA. Similarly, the district court granted summary judgment as to the state court libel claim based on a lack of evidence that MBNA acted with malice. Lastly, the district court concluded that Gorman's claim for violation of Cal. Civ. Code § 1785.25 was preempted by the FCRA. Gorman appealed.

The district court's decision was affirmed in part and reversed in part by the Ninth Circuit. The Ninth Circuit affirmed the decision as it pertained to the claims for libel and under the FCRA for failure to conduct a reasonable investigation after being notified of Gorman's dispute by the CRAs. However, the Ninth Circuit found that Gorman could proceed with a FCRA claim on the basis that MBNA's failure to report that Gorman disputed the validity of the charges rendered the information that it had reported incomplete or inaccurate in violation of FCRA § 1681s-2(b). The court did not hold that failure to report a dispute per se automatically renders the information inaccurate, but rather that it could render the information inaccurate where the consumer had lodged a bona fide dispute. This result

is both logical and in accord with the conclusion reached by the Fourth Circuit. *Saunders v. Branch Banking & Trust Co. of Va.*, 526 F.3d 142 (4th Cir. 2008). It is also consistent with the Fifth Circuit's view that credit information may be incomplete or inaccurate under the FCRA if it is misleading and would be expected to adversely impact credit decisions. *Sepulvado v. CSC Credit Services, Inc.*, 158 F.3d 890, 895 (5th Cir. 1998).

As for the preemption issue, the Ninth Circuit concluded that Gorman could sue under California law because the enforcement provisions of Cal. Civ. Code § 1785.25 go along with Cal. Civ. Code § 1785.25(a) (a state statute that Congress *expressly* chose not to preempt).

The Ninth Circuit issued its decision on January 12, 2009. On October 21, 2009, it denied MBNA's request for rehearing *en banc* and issued a modified opinion. The modified opinion addressed MBNA's attempt to raise a conflict preemption argument for the first time on application for rehearing *en banc*. The Ninth Circuit observed that this argument had been waived but went on to discuss a number of reasons for finding the argument unpersuasive.

2. **Statutory Background.** The FCRA was adopted in 1970 based upon a congressional finding that "[i]naccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system." 15 U.S.C. § 1681(a)(1). As a consumer-protection statute, the FCRA is to be

liberally construed.

The original 1970 statute regulated only credit reporting agencies. The FCRA was amended in 1996 to create rules for persons or entities that furnish information to credit reporting agencies ("CRAs").

Section 1681s-2 sets out two general obligations for persons furnishing credit information. Essentially, § 1681s-2(b) imposes a duty to investigate and modify disputed credit information when the request to do so is received from a CRA. The duty does not exist when the request to fix credit information is received from the affected consumer.

Only accurate credit information is to be reported by a credit furnisher. Among other things, "A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate." 15 U.S.C. § 1681s-2(a)(1)(A). Section 1681s-2(a)(3) adds that: "If the completeness or accuracy of any information furnished by any person to any consumer reporting agency is disputed to such person by the consumer, the person *may not* furnish the information to any consumer reporting agency *without notice that such information is disputed by the consumer*." (Emphasis added).

There is no private right of action for breach of a credit furnisher's duty to provide accurate information to a credit reporting agency in the first instance. However, if a consumer notifies a credit reporting agency that his or her credit report

contains inaccurate information, the credit reporting agency is obligated to ask the credit furnisher to reinvestigate the matter and make sure that the information it has reported is fully true and correct. This second set of duties that relate to the obligations of persons furnishing credit information once notified that the subject of that information disputes its accuracy is found in subsection (b): "After receiving notice pursuant to section 1681i(a)(2) of this title of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency," the furnisher must conduct an investigation into the dispute and rectify any error. 15 U.S.C. § 1681s-2(b)(1). If this is not done, the consumer is afforded a private right of action against the furnisher of the credit information.

The 1996 amendments included language clarifying that Congress did not intend to amend or alter existing legal rights established by state law except those that are fundamentally "inconsistent" with federal law:

> This subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

15 U.S.C. § 1681t(a)

Additionally, the 1996 amendments added a provision at 15 U.S.C. § 1681t(b)(1)(F) generally preempting state requirements and prohibitions with respect to subject matter regulated under section 1681s-2. However, Congress carefully carved out exemptions for more than ten state statutes, including exempting California Civil Code § 1785.25(a) and a similar Massachusetts statute. 15 U.S.C. § 1681t(b)(1)(F)(ii).

It was only after several members of Congress expressed strong anti-preemption sentiment and the legislation was re-worked to preserve the California and Massachusetts statutes that the 1996 amendments to the FCRA were passed.

California Civil Code § 1785.25 is part of the California Consumer Credit Reporting Agencies Act ("CCRAA"), a 1975 statute designed to "require that consumer credit reporting agencies adopt reasonable procedures for meeting the needs of commerce for ... information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." Cal. Civ. Code § 1785.1(c). Section 1785.25(a) recites that a "person shall not furnish information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know the information is incomplete or inaccurate."

Section 1785.25(g) provides a private remedy for a

violation: "A person who furnishes information to a consumer credit reporting agency is liable for failure to comply with this section, unless the furnisher establishes by a preponderance of the evidence that, at the time of the failure to comply with this section, the furnisher maintained reasonable procedures to comply with these provisions." Cal. Civ. Code § 1785.31 codifies the remedies available to a consumer whose credit has been damaged by a violation of § 1785.25(a).

In 15 U.S.C. § 1681t of the FCRA, Congress expressly included a provision that preserved Cal. Civ. Code § 1785.25(a). 15 U.S.C. § 1681t(b)(1)(F)(ii) recites that the preemptive effect of § 1681s-2 of the FCRA "relating to the responsibilities of persons who furnish information to consumer reporting agencies" does not apply "with respect to section 1785.25(a) of the California Civil Code." Nothing in the legislative history of the 1996 FCRA amendments suggests that in preserving § 1785.25(a), Congress intended to *sub silento* strip away the remedies set forth in § 1785.31. When Congress decided not to preempt § 1785.25(a), it concluded that furnishers of credit information should be required to comply with both the FCRA and § 1785.25(a).

REASONS FOR DENYING THE WRIT

I. NEITHER QUESTION PRESENTED IMPLICATES A CIRCUIT SPLIT

No circuit split exists regarding either question presented. Petitioner does not even try to point to a split of authority between the Ninth Circuit *and any*

other court—let alone a federal circuit court—concerning the holding that a credit furnisher must report whether adversely reported credit information is "disputed" or "not disputed" by the affected consumer.

As to the preemption issue, MBNA argues that the Ninth Circuit is in conflict with a small number of district-court decisions. In a footnote, MBNA lists four district-court decisions from Massachusetts, together with district-court decisions from California.

The California district-court decisions present no conflict, as they have been superseded by *Gorman*.[1] Nor does the existence of less than a handful Massachusetts district-court decisions create a conflict among circuits.

Petitioner also argues that the Ninth Circuit's decision has diverged from California state decisions. To support this argument, petitioner cites three California Court of Appeal cases. *Liceaga v. Debt Recovery Solutions, LLC*, 2009 Cal. LEXIS 4272 (2009), is the most recent of the three. Yet the California Supreme Court has depublished *Liceaga* and left intact *Sanai v. Saltz*, 170 Cal. App. 4th 746 (2009), a decision that *concurs* with the Ninth Circuit's preemption ruling. Consequently, California state jurisprudence is fully in accord that the rights and remedies created by §§ 1785.25(g) and

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[1] All but one of the California district court cases relied on *Lin v. Universal Card Services Corp.*, 238 F. Supp. 2d 1147 (N.D. Cal. 2002) or relied on other cases that relied on *Lin*. The district judge in *Lin* was the same district judge who presided over this case.

1785.31 are not preempted.

With regard to *Equifax Services, Inc. v. Cohen*, 420 A2d 189 (Me 1980), cited by petitioner, that court's discussion is based solely on a highly perfunctory and ill-reasoned implied conflict preemption analysis (an argument that has been waived by MBNA). Further, the case was decided many years before the 1996 amendments to the FCRA.

Unless and until a split of circuit authority exists, there is no legitimate basis at this juncture for consideration by the U.S. Supreme Court. This Court should wait until another circuit has squarely confronted at least one of the issues presented.

II. THE FIRST QUESTION PRESENTED IS A NARROW QUESTION OF STATUTORY INTERPRETATION THAT DOES NOT MERIT REVIEW BY CERTIORARI

There is nothing unusual or controversial about the Ninth Circuit's holding that a furnisher's failure to report that a debt is disputed can render the information incomplete or inaccurate under section 1681s-2(b) of the FCRA. The decision is correct on the merits and does not diverge from the precedent of any other circuit.

In petitioner's view, this case merits review by the Supreme Court because: 1) reporting accounts as "disputed" is costly; 2) the reporting requirement is superfluous and of no benefit to consumers; and 3) petitioner hypothesizes that the Ninth Circuit's interpretation will deter furnishers from reporting

any information at all, thereby inflicting great harm on the banking system and the economy as a whole. These arguments fail as a basis for seeking certiorari.

First, petitioner argues (without benefit of evidentiary support in the record) that the automated system used to process the majority of consumer disputes does not provide a mechanism for reporting a consumer account as disputed and that compliance with the Ninth Circuit's ruling will place an undue burden on furnishers to update their systems. This bald assertion is rather surprising given that furnishers have for many years been required to report an account's status as "disputed" or "undisputed" under § 1681s-2(a)(3).[2] Moreover, furnishers also have an obligation to report credit card charges as "disputed" under 12 C.F.R. § 226.13 promulgated pursuant to the Truth in Lending Act. Petitioner's argument that it should not be required to comply with its obligation to accurately report whether negative credit information is disputed by a consumer is hardly a proposition that should be the subject of serious debate, let alone one that merits review by this Court.

Second, petitioner argues that the requirement under § 1681s-2(a)(3) to report information as disputed is superfluous since CRAs already know of

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[2] "If the completeness or accuracy of any information furnished by any person to any consumer reporting agency is disputed to such person by the consumer, the person may not furnish the information to any consumer reporting agency without notice that such information is disputed by the consumer." 15 U.S.C. § 1681s-2(a)(3).

the existence of a dispute. Congress did not agree. As petitioner admits, lenders rely heavily on the accuracy of consumer credit reports. A credit report becomes misleading when a furnisher fails to report that it is and has been aware that an account is disputed by the consumer.

Petitioner's argument is misguided. It is potentially significant from the standpoint of a credit provider whether the consumer disputed the validity of the claimed debt with the original credit provider. Normal credit information can appear on a person's credit report for up to seven years. A person who disputed credit card charges or other charges when they were first posted to his or her account may be a much different person with regard to how he or she manages credit from someone who does nothing, then at a much later time demands that negative information appearing on his or her credit report be removed. Accordingly, when a furnisher reports an account as disputed, it is not merely "echoing back" information known to the CRA. Rather, the furnisher is communicating important information about the consumer to potential lenders. This reality explains the obligation that Congress has imposed on furnishers in section 1681s-2(a)(3), which benefits not only consumers but prospective lenders as well.

The Ninth Circuit relied upon *Saunders v. Branch Banking & Trust Company of Virginia*, 526 F.3d 142, 148 (4th Cir. 2008), which concluded that a private right of action exists under § 1681s-2(b) based on a furnisher's failure to report negative account information as "disputed":

> The FCRA requires furnishers to determine whether the information that they previously reported to a CRA is "incomplete or inaccurate." § 1681s-2(b)(1)(D) (emphasis added). In so mandating, Congress clearly intended furnishers to review reports not only for inaccuracies in the information reported but also for omissions that render the reported information misleading. Courts have held that a credit report is not accurate under FCRA if it provides information in such a manner as to create a materially misleading impression.

Saunders rejected the defendant credit furnisher's contention that Congress had exempted furnishers of information from private liability by placing the initial obligation to report "disputes" in subsection (a): "No court has ever suggested that a furnisher can excuse its failure to identify an inaccuracy when reporting pursuant to § 1681s-2(b) by arguing that it should have already reported the information accurately under § 1681s-2(a)." *Id.* at 149-50. Where there is evidence that a furnisher is aware that the negative account information it is reporting is subject to a bona fide dispute, the existence of the dispute must be reported to the CRAs. *Id.* at 150.

The Ninth Circuit's ruling also cited *Dalton v. Capital Associated Industries, Inc.*, 257 F.3d 409, 415-16 (4th Cir. 2001), for the proposition that a consumer's failure to pay a debt that is disputed "does not reflect financial irresponsibility" and that

the failure to report the existence of a dispute can render the information being reported sufficiently misleading so as to be "incomplete or inaccurate" within the meaning of the FCRA. Pet. App. 33a.

A similar conclusion was reached in *Alexander v. Moore & Associates, Inc.*, 553 F. Supp. 948, 954 (D. Haw. 1982)(summary judgment granted based on a finding that the defendants had violated the FCRA by not attaching a statement of dispute to the file of the plaintiff consumer)(recognizing that if negative account information is "relevant to a consumer's fiscal responsibility and for that reason included in a consumer report, a dispute of such information tending to negate a conclusion of financial irresponsibility is likewise relevant").

Third, there is no evidence to support petitioner's argument that the Ninth Circuit's decision will have an undue chilling effect on furnishers. Petitioner posits that the entire banking system will suffer if the opinion is allowed to stand yet supports this argument with nothing more than reference to an amicus brief submitted in support of petitioner's request for rehearing en banc by the National Association of Screening Agencies ("NASA"). Credit reporting has not ground to a halt since the Ninth Circuit's decision was issued.

In short, the FCRA mandates that credit providers accurately report information. There is nothing unusual or burdensome about this part of the decision. *Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 663 (7th Cir. 2001)(congressional objective underlying the FCRA is "to assure maximum

possible accuracy of the information contained in a consumer's credit report."). Petitioner's argument that the Ninth Circuit's decision will cause grave harm to our banking system is without merit and does not justify grant of the pending petition.

III. THE SECOND QUESTION PRESENTED PERTAINING TO PREEMPTION WAS NEITHER PROPERLY RAISED NOR DECIDED BELOW

MBNA's petition asks this court to review whether the FCRA expressly or impliedly preempts a California statute allowing for private enforcement Cal. Civ. Code § 1785.25(a), which pertains to the obligations of furnishers to CRAs. MBNA raised this argument for the first time in its petition for rehearing *en banc*. The question presented, therefore, is not properly before this Court.

The Ninth Circuit noted this omission:

> On petition for rehearing en banc, MBNA raises for the first time an argument that allowing private enforcement of California Civil Code Section 1785.25(a) is inconsistent with the purpose of the FCRA and thus is preempted under both FCRA § 1681t(a) and ordinary conflict preemption provisions. MBNA did not advance this contention before us initially, so the argument is waived. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).

Pet. App. 57a n.35. To be sure, the Ninth Circuit did append a footnote to its opinion reciting that it would not have been persuaded by MBNA's argument "[e]ven if we were to entertain [it]," but that is not the same as actually "entertain[ing]" the argument.

Because the issue was not briefed or argued on the merits or squarely decided by the court below, it is not properly before this Court. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."); Eugene Gressman, et al., *Supreme Court Practice* 464 -65 (9th ed. 2007).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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